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ENTITLED Freedom of Symbolic Expression in the United States

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Freedom of Symbolic Expression in the United States

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INTRODUCTION

Symbolic expression is an important and common part of America; it ranges from marches to burning flags in the street. The act becomes the unspoken word by conveying a message. One burns a flag in public not because he is a pyromaniac; one chooses to do so because the act delivers his message much more effectively than his words alone could ever do. When there is this element of speech, symbolic expression falls under the protection of the First Amendment to the United States Constitution, which reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.[1]

The issue at hand will deal directly with "freedom of speech" and "the right . . . to assemble," and indirectly with "the right . . . to petition the government." These rights are fundamental and have a special status against infringement, but since one's right to speak is not absolute, an act is even more removed from being an unconditional right. This is the point of inquiry: what forms of expression are or are not permissible; why are these acts committed; and why are some acts allowed, while some are not?

Before freedom of symbolic expression can be thoroughly examined, it must be clearly defined. Basically, it is an act performed to convey a message. This inquiry will deal specifically with forms of political protests in the United States,

including, but certainly not limited to, those actions opposing the Vietnam War and discrimination against blacks. One important form of symbolic expression that will be left out is the labor picket. This is because it is more economical than political, and thus would bring into the argument a plethora of business legislation; since this would draw the analysis away from the main argument, it must be excluded. Therefore, this analysis deals only with actions which convey a political view to the government and the world, not to one's employer. Furthermore, the act which contains an element of speech must not be confused with actual speech itself; this is especially important with cases like Street v. New York, where Justice Harlan avoids dealing with the question of whether burning the American flag is constitutionally protected speech by basing his ruling solely on Street's spoken words against the flag.[2]

THEORETICAL FRAMEWORK

To understand what freedom of symbolic expression means today, it is important to know its origins. This is because the past serves as a foundation for the present to build on. This is analogous to the way one would add on and remodel one's own home; one makes the necessary improvements as time requires, rather than tear it down and rebuild it. The origin is commonly cited as the First Amendment to the United States Constitution, but what it meant at the time it was drafted, and what that meaning evolved into by the twentieth century is of equal importance.

Since the framers of the Constitution and the Bill of Rights were intelligent and educated men, it is reasonable to assume they were influenced not only by public opinion, but also by the theories and historic lessons present at that time. One of the earliest lessons in freedom of expression was Athen's execution of Socrates for corrupting the youth of the city; this injustice was a major factor that led Plato, a student of Socrates, to reject democracy, calling it a flawed system of government. However, men of the modern era felt that democracy was the way to preserve liberty. Milton, in his famous speech to Parliament, in 1644, delivered what has been "widely regarded as the first comprehensive analysis of the arguments underlying free expression."[3] He said that "[w]here there is much desire to learn, there of necessity will be much arguing, much writing, many opinions; for opinion in good men is but knowledge in the making."[4] Later, in 1688, freedom of speech in Parliament and religion were granted in England; in 1694, England abolished censorship. During this period, Hobbes "originated the modern doctrine of natural rights,"[5] labeling the right to refuse to incriminate oneself as one of them.[6] Back in the colonies, English law prevailed, but Hobbes' ideas were not forgotten. When Zenger was charged with seditious libel, his defense attorney, Alexander Hamilton, made a claim to "natural rights":

> It is a right which all freemen claim; to complain when they are hurt. They have a right publically to remonstrate against the abuses of power in the strongest terms.[7]

Zenger was found not guilty; this was another victory for freedom

of expression. These events were by no means a comprehensive development of freedom of expression before the American Revolution, but merely serve as examples of what an intelligent man would have been aware of at the time.

The various documents and rhetoric of the late eighteenth century show that freedom of expression meant more than a few words in the First Amendment of the United States Constitution. In the Declaration of Independence, Jefferson stated that men were "endowed by their Creator with certain inalienable Rights, that among them are Life, Liberty, and the pursuit of Happiness."[8] Despite the fact that this was such a general statement, Jefferson made it quite clear that this new nation would be devoted to preserving individual liberties. The federalist papers represent some of the thoughts of how to protect freedom of expression. Hamilton, in federalist 84, said that the "blessings of liberty" clause in the constitution would be sufficient for protecting people's rights; he said that a bill of rights could not encompass everything and would imply that everything not listed is not a right.[9] Madison, in federalist 10, spoke of freedom of expression in terms of allowing political parties--known as factions at the time--to exist and make their ideas known; he also said that if their ideas "may convulse the society," the ballot box was the solution.[10] However, Madison confessed in a letter to Jefferson--dated October 17, 1788--that he had "always been in favor of a bill of rights."[11]

Pollack, a constitutional scholar, observed that "[r]atific-

ation of the [constitution] was, politically speaking, contingent on a virtual commitment by Madison and his associates to propose liberalizing amendments to the first Congress."[12] Thus, on June 8, 1789, Madison presented his proposed amendments to the constitution, but they were far from being original ideas at the time; the states already had bills of rights or other guarantees of liberties. Massachusetts' constitution included the right to assemble and petition the government, and it noted that the "liberty of the press is essential to the security of freedom in a State."[13] In fact, of the fourteen states at the time the Bill of Rights was ratified, the protections of the right to express oneself were as follows: two states guaranteed freedom of speech; four protected freedom of speech in the legislature; four had freedom of assembly; five had the right to petition the government; six protected people from self-incrimination; eight guaranteed freedom of the press; and thirteen had freedom of religion. This list shows that the right to remain silent, to write one's views, and to "talk" to God in the manner one wished to do so were the most important ones at the time. The Bill of Rights guaranteed these and other rights at the national level; not only did these states ratify the amendments, but as a group--at least with respect to freedom of expression--they endorsed and protected the liberties in their own constitutions. As far as the common people were concerned, they not only supported the idea of having a bill of rights, they feared not having a list of guaranteed freedoms. One widely published article, in 1787,

accused the government of wanting "The Liberty of the Press abolished . . . And death if we dare complain."[14] People feared that a strong national government would be unresponsive to the needs of the individual; the Bill of Rights put the necessary limits on governmental control.

The first significant limit on freedom of expression was the Alien and Sedition Acts. A response to the French threat and the Jeffersonians, it became a crime to "write, print, utter or publish . . . any false, scandalous and malicious writing" against any member of the government of the United States.[15] This met serious opposition from the Republican Party, as Jefferson and Madison declared the acts invalid via the Kentucky and Virginia resolutions. However, neither the Sedition Acts nor the states' attempt to declare a federal law invalid were put to the test at this time; these constitutional questions were to be reserved for another time. Freedom of expression, as a specific issue, would not enter the Supreme Court's agenda until the twentieth century.

Nevertheless, some events relevant to freedom of expression transpired in the nineteenth century. Thomas Jefferson said in his 1801 inaugural address that it was important for men "to think freely and to speak and write what they think."[16] In McCulloch v. Maryland, Chief Justice John Marshall told the nation that the Constitution is not a code, stipulating that the Court "must never forget it is a constitution [it is] expounding."[17] This later became important to understanding why First

Amendment guarantees were not absolute. In 1859, John Stuart Mill published his famous essay, "On Liberty." He supported freedom of speech with vigor when he wrote:

> The opinion which [the government]it is attempted to suppress by authority may possibly be true. Those who desire to suppress it, of course deny its truth; but they are not infallible. They have no authority to decide the question for all mankind, and exclude every other person from the means of judging.[18]

As wise as this statement may have been, it was not original in content. It was when he synthesized this with a statement that looked like a precursor to Holmes' "clear and present danger" doctrine that Mill's genius arose:

> No one pretends that actions should be as free as opinions. On the contrary, even opinions lose immunity, when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act.[19]

Mill did not exert much influence over the men of his time, but his impact became apparent years later, as his ideas showed up in various forms. A few years later, the Civil War stifled freedom of speech, but the issue was more focused on the writ of habeas corpus than the First Amendment. Finally, events such as the Haymarket bomb in 1886 marked "the turning-point away from toleration for extremists."[20] Mill, the Civil War, and events like the Haymarket bomb were especially important as they had both an emotional and intellectual impact on the Supreme Court Justices of the early twentieth century, since many of them lived through these events.

Before an in-depth discussion is made on freedom of symbolic expression, it is important to understand why it exists. The

United States has a sense of responsibility of, as well as a deep attachment and respect for, the Constitution. Although it is not a code, its principles of justice, law, and liberty hold true in the hearts and minds of the people and the government. When this ideal is questioned, the Supreme Court is called upon to interpret our beloved constitution. When the Supreme Court began deciding freedom of expression issues, beginning in the twentieth century, it did so with this respect for national stability and individual liberties. The result is neither oppression nor legalized anarchy; the First Amendment evolves, as its meaning takes shape and form.

ESTABLISHMENT OF DOCTRINES

The Court broke new ground on many freedom of speech cases, and created various tests and theories to deal with these new issues. This section concentrates on the major doctrines, some arising out of cases which did not involve symbolic expression, to provide the framework the Supreme Court works within when they do deal with symbolic speech. These tests become the Supreme Court's guide to what freedom of symbolic expression means.

Application to the states

One of the most important doctrines was born when the Supreme Court, in Gitlow v. New York, said freedom of speech applies to the states via the due process clause of the Fourteenth Amendment. Justice Sanford said that:

> [f]or present purposes we may and do assume that freedom of speech and of the press . . . are among the fundamental personal rights and "liberties" protected by the due process clause of the 14th Amendment from impairment by the states.[21]

The Supreme Court did not apply freedom of speech because it was in the Bill of Rights, but rather because they considered it to be "fundamental." Thomas Emerson, a professor of law, said this "point was briefly stated and passed almost unnoticed, but it turned out to be the most lasting and significant aspect of the decision."[22]

Time, Place, And Manner

Earlier, in the Massachusetts Supreme Court, Holmes formulated his doctrine of allowing time, place and manner regulations if they were content neutral. The case was Massachusetts v. Davis (1895), and the future Supreme Court Justice wrote:

> For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.[23]

The significance of this case was that it established an equal access guideline that, despite modifications, was to be used by the Supreme Court.

Guaranteed Access View

In Hague v. CIO, the Court used the content neutral requirement when it established the right to public forum, also knows as the "guaranteed access view."[24] The Supreme Court said that an

ordinance that allowed a Director of Safety to deny permits, based on his own discretion of danger, was invalid on its face. Justice Roberts, writing for the court, said,

> streets and parks . . . have been used for purposes of assembly, communicating thoughts between its citizens, and discussing public questions. [This] has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens, . . . [which] must not, in the guise of regulation, be abridged or denied.[25]

This established the right to use "streets and parks" to express oneself, free from restrictions on the content of one's message.

Clear And Present Danger Doctrine

Holmes' "clear and present danger" doctrine had a more restrictive view of freedom of expression. In 1919, in Schenck v. United States, Justice Holmes established that if the threat becomes real and powerful, then speech loses its protection:

> The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.[26]

In one of his most famous statements, he gave us an example of this, by saying that freedom of speech "would not protect a man in falsely shouting fire in a theatre and causing a panic."[27] When Holmes explained where the "clear and present danger" may lie, he limited the scope of the doctrine to wartime:

> When a nation is at war many things that might be said in time of peace are of such a hinderance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right.[28]

Thus, creating a hinderance to war efforts appeared to be the true holding of the case; Emerson criticized that the Court, "[w]ithout specifically finding that the leaflet created such a clear and present danger, . . . concluded by affirming the convictions."[29] Nevertheless, this case established the idea that freedom of speech could be restricted if it presented a "clear and present danger."

This doctrine was implicitly upheld in the Frohwerk and Debs cases,[30] but it was Holmes' dissent in Abrams v. United States (1919), which Brandeis joined, that further defined the "clear and present danger" test. While the majority convicted Abrams for interfering with the war effort with Russia, Holmes said the war effort with Germany--which was the issue in Schenck, Frohwerk, and Debs--was a much more serious problem:

> I think we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe should be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.[31]

Holmes was saying that the threat of Germany--in Schenck, Frohwerk, and Debs--was so immediate that it was necessary to restrict any speech that would hurt the war effort; in Abrams, the majority appeared to be building on Holmes' doctrine, but he pointed out that the situation with Russia did not make "it immediately dangerous to leave the correction of evil counsels to time."[32] The test was redefined again in a concurring opinion by Brandeis, which Holmes joined, in Whitney v. California (1927). Brandeis agreed with the majority in that Whitney's

conviction for violating a California Criminal Syndicalism Act should be upheld; he disagreed with the Court's reasoning, which was based on Whitney's collective action being a greater public threat than a few isolated incidents and words.[33] Brandeis saw "clear and present danger" as controlling the case:

> [A]lthough the rights of free speech and assembly are fundamental, they are not in their nature absolute. . . . In order to support a clear finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that past conduct furnished reason to believe such advocacy was contemplated. . . . [N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.[34]

Brandeis gave the doctrine meaning outside the context of war, clarified Gitlow's finding of freedom of speech's fundamentality under the Fourteenth Amendment, and provided a guideline for deciding cases under the test. Emerson noted that the group of cases just presented breaks the test down to: "clear" being the need for a "strong" proof; "present" being "imminent, not remote"; and "danger" being an emotional elicitor.[35] Thus, the test comes down to the causation of the restriction, imminence of the danger, and the seriousness of the danger.

Fighting Words Doctrine

Another test was the fighting words doctrine, established in 1942, in Chaplinsky v. New Hampshire. Justice Murphy, writing for a unanimous Court, and citing Cantwell and Chafee, said that "fighting words" included:

> certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem, . . . those which by their very utterance inflict injury or tend to incite an immediate breach of peace. . . . [S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[36]

This test applies mostly when inflammatory speech is directed at specific individuals, rather than a general statement. Emerson criticized this test as a value judgement by the Court as to what speech is of such "slight social value" to warrant restriction.[37]

Other Tests

Other tests include the balancing test and the incitement test. The balancing test merely asks if the government's interest in preventing violence and turmoil outweighs freedom of expression in a particular case; the problem is that it is a vague test, or as Emerson puts it: "it supplies no satisfactory answer."[38] The incitement test was developed in the Cantwell and Feiner cases, and allows suppression of expression if it may tend to incite one to violence or riot; this test is also vague, and Emerson criticized this as being "an arbitrary formula."[39]

O'Brien Test

Another, more modern, test is the three step-two track analysis, established in United States v. O'Brien (1968). First, the two track analysis is: (1) If the government interest is unrelated to a suppression of free expression, then the regula-

tion is put through "a fairly serious balancing scrutiny"; and (2) If the government interest is related to the suppression of free expression, then the regulation is unconstitutional unless "it falls within a specifically and narrowly defined category of unprotected speech."[40] The three step process is the balancing test of the first track, and it considers if: (1) the regulation "furthers an important or substantial governmental interest"; (2) the government's interest is not related to the suppression of free expression; and (3) the incidental restriction is no greater than that interest.[41] This test was a conglomeration of several tests, including the fighting words doctrine in track two, and balancing tests in track one and the three step process.

CASE ANALYSIS OF FREEDOM OF SYMBOLIC EXPRESSION

Although Congress and the state legislatures pass the laws that restrict freedom of expression, it has been the Supreme Court that had the final say on whether these laws could stand up to one's fundamental right to free expression. The Supreme Court's decisions in freedom of symbolic expression cases have been categorized as: freedom of assembly; the right to public forum; the right to wear clothing that makes a statement; and one's right to express oneself through disrespecting or destroying things, such as the United States flag and draft cards. The Court's job has been to decide how far these rights extend.

Freedom of Assembly

Freedom of assembly, listed in the First Amendment, has been vigorously protected by the Supreme Court. In 1937, DeJonge v. Oregon established freedom of assembly as a fundamental right that applies to the states via due process, as well as the right to hold a meeting. DeJonge was arrested and convicted for taking part in a public meeting held by the Communist Party. Chief Justice Hughes wrote for a unanimous Court, and distinguished this case from Gitlow and Whitney on the grounds that DeJonge's conviction was merely for taking part in a public meeting.[42] He then declared that "legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed."[43] Hughes concluded that "the defendant still enjoyed his personal right of free speech and to take part in a peaceable assembly having a lawful purpose, although called by that Party."[44] Since the expression was unrelated to violence, it was protected by the First Amendment.

In Brandenburg v. Ohio (1969), the Court struck down an Ohio sedition law, while overruling Whitney v. California (1927). Brandenburg, the leader of the Ku Klux Klan, invited a reporter to film one of their rallies, which included hooded figures and racist statements, such as "[b]ury the niggers" and "[w]e intend to do our part."[45] Portions of the rally were televised. This film, along other items, were used as evidence to eventually convict Brandenburg under an Ohio Syndicalism statute, which made criminal,

> advocating . . . the [use] of crime, sabotage, violence, or unlawful methods of terrorism as a means

> of accomplishing industrial or political reform . . . [and to] voluntarily assembl[e] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.[46]

Brandenburg challenged the validity of the statute under the First and Fourteenth Amendments, but was nevertheless convicted. The Supreme Court decided, Per Curiam, in favor of Brandenburg. The Court said the statute in question was like the one used to convict Whitney for "advocating violent means to effect political and economic change." Using a case history analysis, Whitney was overruled, and the Ohio statute was invalidated:

> Whitney has been thoroughly discredited by later decisions, [which] fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to produce such action.[47]

Here, the Court cited DeJonge and relied on an incitement test to invalidate the sedition law. Furthermore, it said that a "statute which fails to draw [the] distinction" between "teaching," and mobilizing a group to "violent action, . . . impermissably intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments."[48] Finally, the Court held that this statute did punish for "mere advocacy" and thus, noting a similarity to DeJonge and Hague, was a violation of the First and Fourteenth Amendments.[49] While this was a freedom of assembly case with a conduct aspect, it was decided on the verbal expression.

Later, in Coates v. Cincinnati (1971), the Court struck down an ordinance that made it illegal for "three or more persons to assemble [on] any of the sidewalks [and] there conduct themselves

in a manner annoying to persons passing by."[50] Justice Stewart, writing for the Court, said:

> [The ordinance is] vague because it subjects the exercise of the right of assembly to an unascertainable standard, and unconstitutionally broad because it authorizes the punishment of constitutionally protected conduct.[51]

Here, the Court struck down the ordinance with the overbreadth doctrine, as Shapiro suggested, "on the grounds that it might be used to prosecute those whose speech simply annoyed their listeners."[52]

In deciding that Communists, Klansmen, and annoying people have a right to assemble and express themselves, the Supreme Court granted the right to belong in a group and advocate its policies, regardless of the fact that a majority of Americans may despise what they stand for. Tolerance was established in these three cases; the only surprising thing was that it took so long, for this nation was founded on allowing what Madison called "factions" to exist.

The right to public forum

The right to public forum is one's right to demonstrate one views in a particular place. This is subject to reasonable time, place, and manner restrictions by the legislature, usually in the form of statutory and permit requirements. The Court has been very reluctant to support prior restraints and the suppression of the speech element of demonstrations, while it has been more willing to uphold statutes narrowly based on time, place, and

manner restrictions.

Public streets

The Supreme Court followed the "guaranteed access view," established in Hague v. CIO, as far as the public streets were concerned. Basically, where one's right to demonstrate in the street has been the only variable, the Court has been quite willing to allow it. In Cantwell v. Connecticut (1940), the Court held a Jehovah's witness had the right to advocate his views, via a record player. Cantwell, played a record in the street, which denounced all organized religions, and then singled out the Catholic Church. When people let him know they were offended, he left and walked up the street. Justice Roberts, writing for the Court, said:

> [The First Amendment] embraces two concepts--freedom to believe and freedom to act. The first is absolute but in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.[53]

Roberts meant that Cantwell had a right to believe in the religious views he advocated, but his right to disseminate those beliefs was not unlimited. Roberts examined the conduct aspect of the case with a combination of a balancing test, the incitement test, the overbreadth test, and the clear and present danger test, with special attention to this last test. In doing this, he concluded that Cantwell committed "no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse." All the Jehovah's witness did was try to

persuade people to buy his book or donate to his cause.[54]

This doctrine that the streets are open to the public was reinforced in 1965, in Cox v. Louisiana I; this involved only the first appeal, which dealt with the charges of disturbing the peace and obstructing public passageways. This case began in Baton Rouge, with the arrest of 23 students for picketing stores that had segregated lunch counters. Cox, a Field Secretary of CORE (Congress of Racial Equality), mobilized a group of students to a courthouse to protest the arrests, obeying the police's order to confine the demonstration across the street from the courthouse. As the white onlookers grew impatient, the police ordered the protestors to disperse, and when they refused, tear gas was used to force them away. The next day, Cox was arrested and charged with "criminal conspiracy, disturbing the peace, obstructing public passages, and picketing before a courthouse"; he was convicted of the last three charges.[55] Justice Goldberg, writing for the Court, overturned the breach of peace conviction as a violation of Cox's rights of "free speech and free assembly."[56] He explained that "constitutional rights may not be denied simply because of hostility to their assertion or exercise," but based his final ruling on the fact that the breach of peace statute was "unconstitutionally vague" and a thus a violation of the First and Fourteenth Amendments.[57]

Justice Goldberg continued in true form by overturning Cox's "obstructing public passages conviction." He criticized the police's action:

> It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute.[58]

The Court called this "unfettered discretion in local officials . . . an unwarranted abridgment of appellant's freedom of speech and assembly secured to him by the First Amendment as applied to the States by the Fourteenth Amendment."[59] The fact that public forum has been granted in the past in Baton Rouge meant that it could not be denied arbitrarily. Emerson noted that this case rendered unconstitutional "most existing breach of peace, disorderly conduct, general sedition, and similar statutes."[60]

In another student demonstration case, Hess v. Indiana (1973), a conviction for intending to incite lawless action was overturned by the Supreme Court. The scene was a demonstration protesting the Vietnam War, in which over 100 demonstrators blocked the street until the police moved them to the curb. Hess, a member of this demonstration, responded to the police's action by saying: "We'll take the fucking street later."[61] He was then arrested and later convicted for this. In a Per Curiam decision, the Court said his words "amounted to nothing more than advocacy of illegal action at some indefinite future time." The Court, relying on Brandenburg, continued:

> [S]ince there was no evidence, or rational inference from the import of the language, that his words were intended to produce and likely to produce, imminent disorder, those words could not be punished by the State on the ground that they had "a tendency to lead

to violence."[62]

Thus, Hess was singled out for his words, or mere advocacy; the mobilizing of a group to violent action was not present, and the demonstration was irrelevant to the case. The case helped to establish that the streets were not completely available to the public; the state had an interest in keeping the streets open, but not in suppressing verbal objections to that interest.

That is basically the conclusion of all three of these cases--Cantwell, Cox, and Hess. The sidewalks are public fora for anyone who wishes to advocate his cause; this rule is violated when the demonstration blocks traffic, which is what happens when people congregate in the street. Basically, the Supreme Court is willing to recognize that people can demonstrate but they cannot just go out and block traffic any time they please.

Permit requirements

Just when can people block the streets? The streets are obstructed every time there is a parade, and this is the very device people use to advocate their cause. One holds a parade, better known as obtaining a permit to march in the streets. These permits are not permitted to suppress certain kinds of speech, whether if it is within the statute or if it leaves the decision to an official; the regulation must contain reasonable time, place, and manner restrictions. This is because prior restraints on "pure speech" are unconstitutional,[63] while those on the act, known as "speech plus," are not always invalid.[64]

Cox v. New Hampshire (1941) dealt with a group of Jehovah's witnesses convicted of parading without a permit, which could cost as much as $300. Chief Justice Hughes writing for the Court, upheld the conviction on the grounds that the permit requirement placed reasonable time, place, and manner restrictions on those who wished to obtain one:

> The obvious advantage of requiring application for a permit was noted as giving the public authorities notice in advance so as to afford opportunity for proper policing. . . . We find it impossible to say that the limited authority conferred by the licensing provisions of the statute . . . contravened any constitutional right.[65]

Although the price of the permit was high, Hughes established that people could not just march through the streets any time they pleased, if a permit law was in effect. Emerson said this case established that "under some circumstances, the government may demand a permit be secured in advance of engaging in assembly or petitioning, and that the permit may impose certain conditions upon the exercise of the right."[66]

A decade later, in Kunz v. New York (1951), a permit system was struck down for lack of appropriate standards of approval. A New York city statute prohibited public worship meetings in the street without first obtaining a permit; this statute also made it unlawful to advocate atheism, or to ridicule or denounce a religion. The police commissioner denied a permit to a religious leader who, in the past, has denounced Catholics and Jews, and has created disturbances. Justice Vinson, writing for the majority, struck down the statute as being too arbitrary, for,

absent more concrete standards, it effectively gave the police commissioner power to control the expression of ideas.[67] Emerson said this case established that although permit systems were acceptable, more concrete standards than "the possibility of 'disorder or violence'"[68] were necessary.

The next two cases both involved a civil rights march, in Birmingham, in the late 1960's. The first, Walker v. Birmingham (1967), upheld a conviction for violating an injunction. It began with Martin Luther King and others being denied a permit to march through the streets of Birmingham. The permit was denied by the City Commission, since a statute gave them the power to deny permits if giving one would threaten the "public welfare, peace, safety, health, decency, good order, or morals."[69] The two organizations demonstrated anyway and were arrested; meanwhile, the city obtained an ex parte injunction enjoining them. In spite of this, the groups protested again, and were held in contempt of court for disobeying an injunction; the Supreme Court of Alabama upheld their convictions, and the United States Supreme Court affirmed this decision. Justice Stewart, writing for the Court, quoted Howat v. Kansas:

> An injunction . . . must be obeyed . . . however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case.[70]

The first part of this statement clearly stated that an injunction could not be violated, regardless of the circumstances; this was not only reasonable grounds to decide the case but was clearly a tactical move by the Court to preserve a part of the

judiciary's power. Unfortunately, this was done at a time when blacks felt that no governmental institution would help them, not even the judiciary. However, Stewart, while dismissing the defendants' argument, opened the door when he said what the Court may have done had the facts would have been a little different:

> [T]his case would arise in quite a different constitutional posture if the petitioners, before disobeying the injunction, had challenged it in the Alabama courts, and had been met with delay or frustration of their constitutional claims.[71]

Stewart was saying that the judicial system did not want symbolic gestures violating its procedures; if one feels justice has not been done, make an appeal.

A demonstrator in the same march eventually got the opportunity to take Stewart up on his challenge, and, in Shuttlesworth v. Birmingham (1969), the ordinance was held invalid by the Court. Justice Stewart wrote the opinion for this case also, and, citing Hague, reaffirmed the right to public forum:

> [O]ur decisions have made clear that a person faced with such an unconstitutional licensing law may ignore it and engage with impunity in the exercise of the right of free expression for which the law purpotes to require a license.[72]

Thus, Stewart was true to his word in Walker; he upheld the right to demonstrate one's views. Emerson described this pair of cases as a political move by the Supreme Court:

> The argument based on preserving an image of the judicial process . . . saves the courts from paying for their own mistakes, but it also transfers the burden to others. In the long run no mystical respect for the courts is likely to persist on the basis of a rule of law that allows the court to punish an individual even when the court itself has been wrong.[73]

Walker, although it preserved the power of the courts at the time, would have been detrimental to the judiciary's credibility without Shuttlesworth. On the other hand, Ledsky of the Ohio State Law Journal saw these two cases in a more positive light:

> Walker should be a warning to those tempted to flaunt the authority of the courts. . . . Shuttlesworth should likewise warn municipal officials who would abuse individual's rights that the court will protect such rights.[74]

The cases involving permits--Cox, Kunz, Walker, and Shuttlesworth--establish the notion that public forum must be granted unless the government deems it absolutely necessary to deny it. When it does deny a permit, reasonable guidelines are needed. If a public official has a great deal of discretionary power in granting permits, the Court will be very critical and highly unlikely to uphold the statute granting him such power. Ledsky said that "[t]o provide the licensor with definite standards for making his decision the legislature should direct guidelines of prohibited activity."[75] One standard that is sure to be struck down without question is the denial of a permit to prevent possible disorder.

Limits on the location of expression

What happens when expression occurs in undesirable places? Can people march through courtrooms, legislative chambers, classrooms, and jail cells? Of course they cannot. But just how close can people get to these and other institutions? Groups exert their influence by directing their protest and their hate

at their target, or by petitioning the government via a demonstration.

In Edwards v. South Carolina (1963), the Supreme Court upheld the right to march. In this case, 187 black student demonstrators marched along the South Carolina State House to protest against racial discrimination. After forty-five minutes, the police ordered them to disperse within another fifteen minutes; after the fifteen minutes elapsed, the demonstrators were arrested, tried, and convicted of breach of peace. Justice Stewart, speaking for the Court, overturned their convictions. Having decided that the protestors were convicted for having "stirred people to anger, invited dispute, or brought about a condition of unrest,"[76] Stewart held that these convictions did not come from a narrowly drawn statute and thus, the offense was too general. Furthermore, the Court held there was no violence or fighting words. Finally, he held that "[t]he 14th Amendment does not permit a State to make criminal the peaceful expression of unpopular views."[77] Although the statute did not involve the location of the protest, the opinion did mention that along with free speech and assembly, this included the freedom to petition the government for redress of grievances "in their most pristine and classic form."[78] Thus, the Court established that, absent a reasonable and narrowly drawn statute, it was going to allow demonstrations on the grounds of public buildings.

In Cox v. Louisiana II, which was the second appeal filed in the case, the Supreme Court narrowed the broad implications of

the Edwards ruling. In Cox I, the Court invalidated the convictions by invalidating the statutes outlawing breach of peace and obstructing public passages: in the second part, it upheld the statute forbidding picketing near a courthouse, while reversing the convictions. Goldberg, who wrote for the Court in Cox I, wrote the majority opinion in this case, also. He said the statute was narrowly drawn as a protection of the judicial system; thus, it was valid on its face, and did not "infringe upon the constitutionally protected rights of free speech and free assembly."[79] Therefore, the statute was a reasonable time, place, and manner restriction. After rejecting the clear and present danger test, he held that the conviction must be reversed on the grounds that the statute was not violated. In fact, the "[a]ppellant was led to believe [by the police] that his demonstration on the far side of the street [from the courthouse] violated no statute." Moreover, the order to disperse was based on "disturbance of the peace," which was invalidated in first part of the case. Justice Goldberg then concluded:

> [T]he dispersal order had nothing to do with any time or place limitation, and thus, on this ground alone, it is clear that the dispersal order did not remove the protection accorded appellant by the original grant of permission.[80]

Since the demonstration remained as peaceful as when it started, the "original grant of permission" was still in effect. Thus, the police's order amounted to a indefinite value judgment. An interesting dissent in this case was written by Justice Black, who claimed that the protection of the judicial process was more

important than the appellant's "mistaken belief that he and his followers had a constitutional right to [demonstrate]."[81] Black's broad, sweeping solution was too simplistic, as it would have granted public authorities the unfettered discretion the Court was trying so diligently to prevent. Nevertheless, according to the majority, courts could be given special protection, but it was still unclear how far outside its doors this realm extended.

One answer to the question of just how far the radius of the courts' realm extended was in United States v. Grace (1983). Justice White, writing for the majority, ruled unconstitutional a federal statute which prohibited the "display [of] any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement in the Supreme Court building and its grounds."[82] In overturning a conviction for displaying such an item on the sidewalk outside the building, White said those sidewalks were indistinguishable from others:

> Those sidewalks are used by the public like other public sidewalks. There is nothing to indicate to the public that these sidewalks are part of the Supreme Court grounds or are in any way different from the other public sidewalks in the city. We seriously doubt that the public would draw a different inference from a lone picketer carrying a sign on the sidewalks around the building than it would from a similar picket on the sidewalks across the street.[83]

In contrast to Cox, there were no instructions by the police; there was merely an arrest based on violation of a statute. Furthermore, the Court decided the scope of protection of their workplace, and not all courts in general. Taken with Cox, this

means that the protected vicinity of a court must be within a reasonably obvious region. It may be that a proper warning by the police is the method of defining this boundary. Nevertheless, it was clear that to protect a court, a statute was necessary; for example, in Cohen v. California (1971), the Supreme Court dismissed the issue of the offensive speech occurring in a courthouse, since no statute forbade it.[84]

Several other cases involving the location of the protest originated in Louisiana, arising out of the Negroes' reactions to the state's poor stance on civil rights. In Garner v. Louisiana (1961), there was a sit-in by Negroes at a whites-only lunch counter; they were convicted of "disturbing the peace," which the Supreme Court reversed on the grounds that the demonstration was peaceful and did not amount to "passive conduct likely to cause a public disturbance."[85] In Taylor v. Louisiana (1965), the sit-in by Negroes occurred in a whites-only waiting room at a bus station. Their convictions were also overturned Per Curiam by the Court, even though white onlookers grew restless.[86] These cases involved actions that only took the form of a demonstration in a racially segregated community; therefore, their convictions were the result of blatant discrimination against black people, and the Supreme Court recognized this. The facts in Cox v. Louisiana (above) were not as obviously racist, but prejudicial actions by the police led the Court to reverse the convictions anyway.

The facts in Brown v. Louisiana (1966) also arose out of

this public segregation, as several Negroes were convicted for holding a sit-in in a public library. However, the larger issue was the right to hold a peaceful demonstration inside a public building. The scene consisted of a segregated library system, in which it appeared that black people could only retain its services from a specific bookmobile. The "crime" began when five young Negro males marched into the library and requested a book; after the librarian told them the book was unavailable, they stayed--even after the librarian requested they leave. When the sheriff arrived, he asked them to leave, and then arrested them for refusing to do so. They were soon convicted of breach of peace and refusing to leave the premises. Justice Fortas, writing for a plurality of the Court, reversed the breach of peace convictions. Citing Shuttlesworth, Cox v. Louisiana, and other cases, he concluded the "[p]etitioners cannot be convicted merely because they did not comply with an order to leave the library."[87] He then labeled this case as involving protected symbolic speech and blatant discrimination:

> [T]he right under the First and Fourteenth Amendments guaranteeing freedom of speech and of assembly, and freedom to petition the Government for redress of grievances . . . are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities.[88]

Thus, Fortas relied on the right to demonstrate one's views in this manner, and their right to use the library peacefully; however, only Warren and Douglas joined him in this opinion.

Therefore, both Brennan's and White's concurrences also decided the case. Brennan held that the breach of peace statute was unconstitutional due to "overbreadth," overturning their convictions.[89] Justice White, on the other hand, said this was not a First Amendment case, and based his opinion on one's right to equal protection of the law, saying that "[t]he conclusion that petitioners were making only a normal and authorized use of this public library requires the reversal of their convictions."[90] Despite the Court's disagreement on how to decide the case, the majority did agree that the young men had a right to remain in the public library and exercise their right of petition. This conclusion is given weight in Black's dissent, when he objected to the library being "used for the purpose of conducting protests."[91]

Nevertheless, in that same year, Justice Black got to impose his limits on public fora, not to libraries, but to jails. In Adderley v. Florida (1966), 32 Florida A & M University students were convicted of "trespass with a malicious and mischievous intent" for marching from the school to the jail to protest the previous arrests of other protesting students.[92] Although the students claimed their situation fell into the realm of Edwards and Cox I, Justice Black, writing for the majority, upheld their convictions. First, he distinguished this case from Edwards, by stating: "Traditionally, state capitol grounds are open to the public. Jails, built for security purposes, are not."[93] He distinguished Cox I, noting that it dealt with a vague statute,

while the present statute specifically outlaws trespassing. Black then justified the sheriff's authority to order the students to leave the jail:

> The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. For this reason there is no merit to petitioners' argument that they had a constitutional right to stay on the property, over the jail custodian's objections. . . . The [Constitution] does not forbid a State to control the use of its own property for its own property for its own lawful nondiscriminatory purpose."[94]

Black's majority opinion looks a lot like his dissent in Brown v. Louisiana. This seems to imply that the Court was willing to protect First Amendment freedoms in some places but not others. Just what other places besides jails and courthouses were to be restricted was uncertain.

Another public building the Supreme Court had the opportunity to grant or deny public forum at was the school. In Police Department of Chicago v. Mosley (1972), the Court invalidated a statute which prohibited all picketing except those involving labor disputes within 150 feet of a school. Marshall, writing for the majority, said that "[t]he central problem with Chicago's ordinance is that it describes the permissible picketing in terms of subject matter." He went on to say that this violated the Equal Protection Clause of the Fourteenth Amendment, as well as the First Amendment.[95]

On the same day, the Court shed some light on the restrictions allowed on school grounds. In Grayned v. Rockford (1972), it upheld a statute that prohibited noise on grounds adjacent to

the school that would disturb a class in session. The appellant was in a mass demonstration in front of a high school and was convicted of violating this statute. Justice Marshall, writing for the majority, said that "the nature of the place" made the statute a reasonable "time, place, and manner" restriction. Marshall went on to say:

> [The ordinance is] narrowly tailored to further Rockford's compelling interest in having an undisrupted school session conducive to the students' learning, and does not unnecessarily interfere with First Amendment rights.[96]

Here, the Court used the compelling interest test to balance the interest of the school with the First Amendment; since the means were necessary, the Court upheld the statute.

Some other public institutions include parks, malls, and foreign embassies. In Clark v. Community For Creative Non-Violence (1984), the Court upheld an statute that prohibited camping in certain parks in Washington D.C. CCNV, while trying to help the homeless, was allowed to demonstrate in Lafayette Park and the Mall. When the group wanted to sleep overnight in these places in order to make a statement and get more homeless people in the demonstration, they were denied because of anti-camping regulations. Justice White, writing for the Court, said that "overnight sleeping in connection with the demonstration is expressive conduct protected to some extent by the First Amendment, . . . [and] subject to reasonable time, place, and manner restrictions."[97] He then applied the O'Brien test, with the three tracks proceeding as follows: (1) prohibiting camping

furthers the "Government's substantial interest in maintaining the parks"; (2) the governmental "interest is unrelated to suppression of expression"; and (3) the governmental interest of protecting the park is greater than the First Amendment interest in facilitating the demonstration.[98]

The Court decided on the status of foreign embassies, in Boos v. Barry (1988). A District of Columbia statute forbade displays offensive to foreign governments and prohibited congregations, except those involving labor disputes with those buildings, within 500 feet of any foreign embassy. Boos, and two others, sued for the right to display signs critical of the governments of Nicaragua and the Soviet Union and to congregate on the sidewalks within 500 feet of both embassies. Justice O'Connor, writing for the Court, held: the display clause, due to its content-based nature, violated the First Amendment the congregation clause was narrowly tailored; and the labor picket provision did not violate equal protection.[99] Foreign embassies, as well as parks and malls in our capitol, received some but not absolute protection.

Another government institution is the military. Are its buildings and bases given special protection? In Bachellar v. Maryland (1970), Justice Brennan implied that their recruiting stations did not have a special status, while upholding the right to hold a sit-in in the stations. There was an antiwar demonstration in front of an Army Recruiting Station, after which they had a brief sit-in inside the station. The demonstrators were

then arrested and convicted of disturbing the peace. Brennan said that the jury instructions suggested the petitioners may have been convicted because their views were "offensive to some of their hearers." This type of conviction would be unconstitutional, so the Court overturned them.[100] Here, Brennan did not really deal with the status of the recruiting station, but rather concentrated on chipping away at the incitement test.

However, the status of military bases was the main issue in United States v. Albertini, (1985). Albertini was barred from entering Hickam Air Force Base in Hawaii, without written permission, as a result of having been convicted, in 1972, of conspiracy to destroy government property. In 1981, on Armed Forces Day, while taking part in a peaceful demonstration that the general public was allowed to partake in, Albertini was arrested and convicted for entering the base. O'Connor, writing the opinion for the Court, upheld Albertini's conviction, dismissing his protest activity as irrelevant:

> Respondent was prosecuted not for demonstrating at the open house, but for reentering the base after he had been ordered not to do so. [The power of a commanding officer to exclude should not] be analyzed in the same manner as government regulation of a traditional public forum simply because an open house was held at Hickam.[101]

Thus, the Court avoided conflict with the military, and allowed them to control their own space. However, this case and Bachellar leave a lot of middle ground; for now, it is safe to say that military bases can be regulated by the military , while their recruiting stations may be open to any peaceful public demonstra-

tions.

Finally, are private homes safe from the intrusion of unwanted expression? The Court began to answer this question in Gregory v. City of Chicago (1969). In this case, Gregory led a march from city hall to the front of Mayor Daley's home to protest his failure to desegregate the schools. A hostile crowd gathered and threw rocks and eggs at the demonstrators. Trying to prevent a riot, the police ordered the demonstrators to disperse, and when they refused, arrested them for disorderly conduct. The Supreme Court unanimously reversed. Chief Justice Warren, writing for a five-person majority, held that since there was no disorderly conduct, the statute was not violated. He also held that their conduct was protected by the First Amendment. The Court dismissed the issue of the refusal to disperse.[102] It also seemed to assume that picketing in front of the Mayor's home was acceptable.

The facts of Carey v. Brown (1980) were similar to Gregory. In 1977, a demonstration was held in front of Mayor Bilandis' home in Chicago, protesting his failure to support the busing of school children to achieve racial integration. The protesters were arrested and convicted under an Illinois statute that made it "unlawful to picket before or about the residence or dwelling of any person, except when [used] as a place of business."[103] Brennan, writing the opinion of the Court, said the statute was "constitutionally indistinguishable from the ordinance invalidated in Mosely, [for it] accords preferential treatment [to] labor

disputes, . . . but discussion of all other issues is restricted."[104] Since the statute was content-based, the privacy of the home was not considered. Yet, the Court reaffirmed that labor protests were not more important than other kinds of protests.

Gregory and Carey represented the government's failed attempts to protect the home; but these cases, along with others, such as Mosely, taught legislatures a valuable lesson in how to draft a statute for that purpose. This is what happened in Frisby v. Schultz (1988), which took place in Brookfield, Wisconsin. Schultz and others held an anti-abortion protest outside the home of a doctor who performed abortions, and although it was orderly and peaceful, it was held at least six times in a month. In the midst of this picket, the town passed an ordinance identical to the one in Carey, but the town attorney noticed this mistake and they passed a new one. The ordinance made it "unlawful for any person to engage in picketing before or about the residence or dwelling of any individual, [the purpose being] the protection and preservation of the home."[105] The appellees ceased picketing when the ordinance went into effect and sued under the First Amendment. Justice O'Connor wrote the opinion for the Court, upholding the ordinance as "content neutral."[106] She applied the overbreadth doctrine to the statute as applied, and concluded:

> The First Amendment permits the government to prohibit offensive speech as intrusive when the "captive" audience cannot avoid the objectionable speech. . . . Because the picketing prohibited by the Brookfield ordinance is speech directed primarily at those who are presumptively unwilling to receive it, the State has a

substantial and justifiable interest in banning it.[107] Thus, the Court held that the home is protected. Furthermore, this case was consistent with Black's analysis (above) in Adderley, where he equated the government and private property owners, while saying jails were off-limits to demonstrations; it would then follow that the private property owner could be free from the same unnecessary intrusion. Although the Court in Frisby did not use this analysis, it was interesting to note its consistency in this area.

Clothing As a Political Statement

This section deals with people making themselves a symbol of their cause, by wearing something that conveys a message. This means that it involves much more than marching through the streets with signs and delivering speeches. Turning one's physical self into a statement has all the freedoms and restrictions that the various marches, sit-ins, and demonstrations has; however, it is still a different issue. Nevertheless, the Court has been very supportive of individual freedom in this area, as it tended to label this as "pure speech."

Tinker v. Des Moines Independent Community School District (1969) dealt with more than whether one could wear armbands to protest the Vietnam war, but it also involved whether students could do so in a public school. This makes this case relevant to the above discussion of where public forum is or is not granted. Incidently, this case was decided before Grayned and Mosely, the

school cases limiting expression on school grounds. The case involved a decision by a group of adults and students to wear black armbands to protest the war; when the principals of the Des Moines schools heard of this plan, they banned the wearing of armbands. The students were aware of this new rule, but they wore them anyway, and were suspended from school for doing so. Their fathers filed a complaint in their name, which eventually made its way to the Supreme Court. In his majority opinion, Justice Fortas cited Cox and Adderly, and stated:

> [T]he wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to "pure speech" which we have repeatedly held, is entitled to comprehensive protection under the First Amendment.[108]

Fortas held that this clothing was indeed speech, and not "speech plus" as symbolic expression normally is. Furthermore, the conduct was passive, and did not disrupt other students' right to education. He then went on to say that "students or teachers [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," and concluded that the school officials' intent was to punish this protected speech.[109] Both the student's right to passive protest in school, as well as the wearing of clothing being protected speech, were established.

Schacht v. United States (1970) was decided a year later, and it involved a the conviction of a man who performed a skit in a military uniform to protest the Vietnam war. Justice Black, writing for a unanimous Court, overturned this conviction as a violation of First Amendment freedoms. Black addressed section

702 of a statute that prohibited the wearing of a military uniform without permission; he also considered the exception in section 772, which granted permission to "theatrical or motion-picture productions . . . if the portrayal does not tend to discredit that armed force."[110] After establishing that Schacht's skit was a "theatrical production," the Court concluded that with these two sections put together, it was clear:

> Congress has in effect made it a crime for an actor wearing a military uniform to say things during his performance critical of the conduct or policies of the Armed Forces. . . . [Thus], his conviction can be sustained only if he can be punished for speaking out against the role of our Army and our country in Vietnam. Clearly punishment for this reason would be an unconstitutional abridgment of freedom of speech. The final clause of section 772 . . . must be stricken from the section.[111]

The Court recognized that Schacht's theatrical conduct deserved the protection of speech, and overturned his conviction, while invalidating the part of the relevant statute that restricted speech. The Court did not even consider using the clear and present danger, incitement, or any other test that justified restrictions on freedom of expression; this reluctance to restrict expression suggests that the Court put the threat of the Vietnam war on the same level Holmes put that of Russia in Abrams. Nevertheless, the Court's main concern was that actors had a right to free expression, and that a statute unconstitutionally abridged that right.

One year later, in Cohen v. California (1971), the Court reversed the conviction of Cohen, who displayed his negative views of the Vietnam War, by parading in a courthouse with a

jacket bearing the inscription, "Fuck the Draft." He was convicted for violating a statute prohibiting "maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person by offensive conduct."[112] Harlan wrote the opinion for the Court; he said that under O'Brien, conduct could be regulated, while the restriction of speech had limits. He breathed meaning into this idea, when he stated that the conviction,

> then, rests squarely upon his exercise of the "freedom of speech" [and] can be justified, if at all, only as a valid regulation of the manner in which he exercised that freedom, not as a permissible prohibition on the substantive message it conveys.[113]

First, Harlan inquired into this possibility of a time, place, and manner restriction; the fact that it was in a courthouse was irrelevant because the issue was not in the statute. Second, the notion of obscenity was rejected; the words on the draft would not likely have sexual connotations for its viewers. Third, the fighting words doctrine of Chaplinsky did not apply because the four letter word was not directed to a particular person. Finally, the unwilling viewer need not be protected outside of the home. Justice Harlan then summed this up by saying that the remote possibility of incitement to violence does not give a "governmental power to force persons who wish to ventilate their views into avoiding particular forms of expression."[114] Thus, the wearing of an obscene word to express one's views was protected speech under the First and Fourteenth Amendments.

This type of expression presented an interesting issue, as derogatory statements on clothing since this case have included

those against Iran and various athletic teams. These modes of expression have been commonly looked upon as a harmless way of venting out aggressions. Perhaps it was better to display hatred on jackets and T-shirts than to resort to violence.

The next case involved hatred for a group, but on a much grander scale. This was the Nazi's hatred of Jews; not only did they want to express their hate publically, but they wished to do so in Skokie, Illinois, a predominantly Jewish community, with their uniforms, swastikas, armbands, and signs. Although the group said they would not obstruct traffic, distribute literature, or make any derogatory statements towards any group, an injunction was obtained against them, preventing them from promoting their cause. This set the scene for National Socialist Party v. Skokie (1977). In a Per Curiam opinion, the Supreme Court invalidated Skokie's use of the injunction as a procedural process that effectively deprived the group of their First Amendment rights:

> If a State seeks to impose a restraint of this kind, it must provide strict procedural safeguards, Freedman, including immediate appellate review. Absent such review, the State must instead allow a stay.[115]

Because of the long time it took to appeal, the Court concluded that this amounted to a denial of First Amendment rights.

This case presented an important issue: can groups that were hated for their inhumane acts in the past be allowed to exist and air their views? The Court moved away from its position of restricting the actions of such groups, as it has done from World War I through post World War II to a more tolerant view. In an

essay criticizing this case, as well as this path the Court has followed, Will complained that "[a]fter 60 years of liberal construction of the First Amendment, almost anything counts as 'speech'; almost nothing justifies restriction."[116] On the other side of the issue, the ACLU supported the Nazis' rights in this case, saying: "[t]he principles of the First Amendment are indivisible. Extend them on behalf of one group, and they protect all groups. Deny them to one group, and all groups suffer." They concluded by stating: "We cannot remain faithful to the First Amendment by turning our backs when it is put to its severest test--the right to freedom of speech for those whose views we despise the most."[117] The Court seems to have taken the ACLU's position with freedom of expression when the person becomes a symbol by virtue of his clothing. This kind of speech has been given the status of a passive form of expression that has few, if any, restrictions on its use.

Expression Involving Flags and Draft Cards

The last category deals with one's right to display and treat various flags in any manner, especially "Old Glory," and the right to burn one's draft card. The significance of these actions is that in private, they usually fall under conduct; however, when one publically performs these actions, they take the form of speech. For example, the proper way to dispose of a flag is to burn it, which is acceptable conduct; but when someone burns the flag in the street as a statement against the govern-

ment, it becomes a form of speech that is socially unacceptable. This behavior has a conduct element more similar to marches than to that of wearing clothing, for clothing is passive and more speech-oriented, while marches and the present category consist of conduct that becomes speech.

In Stromberg v. California (1931), the Supreme Court overturned a conviction for the displaying of a red flag--the symbol of Russia. A day-camp instructor taught children communist ideas and led them in a daily ceremony in which they raised the red flag and cited a pledge of allegiance to this communist flag. She was then convicted under a State statute which said:

> Any person who displays a red flag . . . in any public place or in any meeting place . . . [1] as a sign, symbol, or emblem of opposition to organized government or [2] as an invitation or stimulus to anarchist action or [3] as an aid to propaganda that is of seditious character is guilty of a felony.[118]

Chief Justice Hughes, writing for the majority, said that the jury verdict was "a general one" that could have equally relied on any of the three parts of this statute.[119] After he stated that "liberty under the due process clause of the Fourteenth Amendment embraces the right of free speech, Gitlow, Whitney, Fiske," Hughes noted the right was not "an absolute one."[120] Within this context, he concluded the second and third clauses of the statute were valid within the state's power to punish those whose words "incite to violence . . . and threaten the overthrow of organized government." However, the first clause was struck down, for it had the possibility of prohibiting opposition to the political party in power:

> The maintainance of the opportunity for free political discussion to the end that government may be responsible to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system. A statute which is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment.[121]

Having said this, the Chief Justice held the first portion of the statute unconstitutional, and while he reversed the conviction, he remanded the case to be redecided on the grounds of the second and third clauses of the statute. Emerson said the Court "paid remarkably little attention to the fundamental question of defining 'expression' and 'action,'" and that "the Supreme Court had assumed that displaying a red flag as a symbol of opposition to organized government constituted expression, but had not elaborated upon that position."[122] This was true, for the Court had not yet formulated a theory in this area. Many years later, when it did have a theory, the Supreme Court struck down a similar provision in Boos v. Barry (1988); the only real difference was that this statute used the word "sign" instead of "flag," and it was protect foreign governments at their embassies instead of the American government.[123]

The flag salute cases stand out in this line of cases, for it involved the right not to perform a conduct with symbolic importance; this non-performance became symbolic expression in itself. The interesting point was that the first case was overruled by the second only three years later. In Minersville School District v. Gobitis (1940), the Court upheld the expulsion

of Jehovah's Witnesses children from school for refusing to salute the flag. Although the refusal was for religious beliefs, Justice Frankfurter, writing for the Court, said these beliefs were outweighed by the need for "national unity" and judicial deference to the legislature in this area. He concluded:

> [F]or us to insist that, though the ceremony [of saluting the flag] may be required, exceptional immunity must be given to dissidents, is to maintain that there is no basis for a legislative judgment that such an exemption might introduce elements of difficulty into the school discipline, might cast doubts in the minds of other children which would themselves weaken the effect of the exercise.[124]

Thus, a student could be required to salute the flag.

Gobitis was overruled in West Virginia State Board of Education v. Barnette (1943). The Board of Education, in response to the Gobitis decision, made a resolution that all teachers and pupils "shall be required to participate in the salute honoring the Nation by the Flag; provided, however, that refusal [is] an act of insubordination, and shall be dealt with accordingly."[125] This case also dealt with children of the Jehovah's Witnesses faith refusing to salute the flag because of their religious beliefs. Justice Jackson, writing for the majority, dismissed the religious freedom issue, held that the Fourteenth Amendment's hold on the states applied to a state board of education, and that the mandatory salute violated the First and Fourteenth Amendments.[126] Jackson delivered the final blow to the Board of Education's rule, as well as Gobitis:

> [No] official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess

> by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[127]

Thus, compulsory saluting of the flag violated freedom of expression under due process, and Gobitis was overruled. Frankfurter, the author of the opinion in Gobitis, wrote a strong dissent in this case; he accused the majority of policy-making, and, citing Holmes, he said that this was a decision to be left to the legislature. He then stipulated:

> [T]his Court's only and very narrow function is to determine whether within the broad grant of authority vested in the legislatures they have exercised a judgement for which reasonable justification can be offered.[128]

Nevertheless, according to the Iowa Law Review, this case and Stromberg meant "the state cannot explicitly punish unpatriotic expression even if it takes a form other than free speech."[129]

This next case was decided over two decades later, in the heat of the Vietnam War. Often referred to as the draft card burning case, United States v. O'Brien (1968) involved a conviction for burning a selective service card. O'Brien and three others burned their draftcards on the steps of a courthouse; the FBI arrested him, and he was later convicted under a 1965 amendment that added the words, "knowingly destroys, knowingly mutilates," to an already existing statute, so that it made it an offense to anyone, "who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate."[130] Chief Justice Warren, writing for the majority, upheld the conviction. He first affirmed the validity of the statute,

as amended, as "not abridg[ing] free speech on its face,":

> [W]hen "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.[131]

He then created a formula known as his "three step-two track" theory of scrutinizing these regulations (a detailed account of this is in the Doctrines chapter).[132] He affirmed Congress' power to issue the draft as "beyond question," and thus, "legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose." He then described these purposes as: a proof of registration; a facilitation of communication; a reminder to the registrant; and preventing forgeries of such certificates.[133] Then, he concluded:

> We perceive no alternative means that would more precisely and narrowly assure the continuing availability of issued Selective Service certificates than a law which prohibits their wilful mutilation or destruction. . . . The 1965 Amendment prohibits such conduct and does nothing more. . . . [Thus], [f]or this noncommunicative impact of his conduct, and for nothing else, [O'Brien] was convicted.[134]

Since this statute was narrowly tailored to prohibit conduct, the case was distinguished from Stromberg, where the Court had stricken part of a statute that suppressed expression. Having said this, Warren quickly set aside O'Brien's objections to Congress' motives: "this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive"; he later said that it was the "inevitable effect" of the legislation, not the "motive" that was the deciding factor in previous cases.[135] It has been this second part of the rul-

ing that has drawn the most criticism from constitutional scholars.

Several scholars suggested that Congress intended to suppress speech when it passed the 1965 amendment, including Emerson[136] and Alfange. Dean Alfange, Jr., then an assistant Professor at the University of Massachusetts, pointed out that students have been burning their draft cards long before O'Brien; after which they would apply for new ones. Even the military did not have any serious objections; when five people burned their cards in New York City in 1965, Colonel Akst, director of Selective Service for the city, said: "It's just a nuisance. They'll just come in to their local boards and get a duplicate card."[137] Despite the military's virtual disinterest in the matter, Congress made an issue out of suppressing this widespread form of dissent against the war with the passage of the Rivers amendment, in 1965. Alfange specifically criticized Warren for "treat[ing] the amendment essentially without reference to the context in which it was enacted."[138] Realizing that courts try to avoid second-guessing the motives of the legislature, Alfange said the courts would not have to confront the legislature but could look for a "repressive effect" on liberty that overrides a "valid public interest."[139] Basically, the Court should have taken a closer look at the relevant facts surrounding the case before it passed judgment; Warren failed to do this, as he placed a military interest on a disinterested military by saying the draft card burnings were meant to directly disrupt the war effort,

rather than recognize it as symbolic expression that was intended to convey a message.

The next four cases deal with flag desecration; one issue running through these cases is the government's interest in prohibiting this symbolic speech in the name of preserving the sanctity of the flag as a symbol of national unity. Street v. New York (1969) completely avoided this issue, with Justice Harlan deciding this case on the words spoken against the flag. Street, took the flag out to the street, put it on newspaper so it would not touch the ground, burned it, and cried out: "We don't need no damn flag."[140] He was convicted of a New York statute that forbids one to "mutilate, deface, defile, or defy, to trample upon or cast contempt upon either by words or act [any flag of the United States]."[141] Harlan held that this provision "was unconstitutionally applied in [his] case because it permitted him to be punished merely for speaking defiant or contemptuous words about the American flag."[142] He then applied balancing tests to four possible state interests and concluded that Street: (1) could not be prohibited from advocating "peaceful change"; (2) did not use "fighting words" [Chaplinsky]; (3) could not be stifled because he may offend somebody; and (4) had the right to differ from "the heart of the existing order [which] encompasses the freedom to express publically one's opinion about our flag." [Barnette][143] This case provided a clear guideline for the use of words spoken against the flag, but, due to Harlan's avoidance of the issue, gave no clear guidelines as to what

conduct against the flag was permissible. At best, it appeared that flag desecration was protected speech.

This question was slowly answered by the Court, and in 1974, two such cases were decided. In Smith v. Goguen (1974), the Supreme Court overturned the conviction of a man who wore an American flag patch on the seat of his pants, because the statute that forbade "contemptuous" treatment of the flag was void for vagueness.[144] This case did not say much about flag desecration, either, because the Court was merely dealing with a poorly drawn statute.

However, the second case of the year, Spence v. Washington (1974) did deal with the issue, as the Supreme Court overturned Spence's conviction for displaying the flag with a peace symbol on it. However, as the facts show, Spence was a peaceful man who had the utmost respect for the flag. He displayed his American flag out his window, with a peace symbol made of removable tape upon the flag. When the police entered his apartment, Spence offered to remove the flag, but they arrested him anyway; he was then tried and convicted under a Washington "improper use" statute.[145] Spence said that he did this to protest the invasion of Cambodia and the killings at Kent State, and he "wanted people to know [he] thought America stood for peace"; furthermore, he said he used tape so that he could remove the peace symbol without damaging the flag.[146] The Court decided this case Per Curiam, in favor of Spence. First, four important factors were noted by the Court: (1) he owned the flag; (2) he displayed it on

private property; (3) he committed no breach of peace; and (4) he "engaged in a form of communication."[147] Concluding that Spence did not violate the statute and did not ruin the flag, the Court said:

> Given the protected character of his expression and in light of the fact that no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired by these facts, the conviction must be invalidated.[148]

The Court made it clear that a privately owned American flag could be used to convey a message, but as Shapiro pointed out, the Court "carefully avoided holding that desecration or destruction of the flag was constitutionally protected."[149]

However, in Texas v. Johnson (1989), the Supreme Court met the issue of flag desecration head-on. The Court overturned Johnson's conviction for burning the flag as a violation of the First Amendment as applied to the states by the Fourteenth. During a protest of the Reagan Administration, outside of the place the 1984 Republican National Convention was being held, Johnson set fire to a flag that someone took down from a flag pole, while he and his fellow protestors chanted: "America, the red, white, and blue, we spit on you."[150] Johnson was the only one of the 100 demonstrators who was tried, and he was subsequently convicted under a Texas flag desecration statute, which made it illegal to:

> deface, damage, or otherwise physically mistreat [a state or national flag] in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.[151]

Justice Brennan, writing for the majority, overturned this

conviction and struck down the statute. Using the O'Brien test, he decided that, given the facts of the case, "Johnson's burning of the flag was 'sufficiently imbued with elements of communication,' Spence, to implicate the First Amendment."[152] Having decided that burning the flag was symbolic expression, Brennan dealt with the State's interest in "preventing breaches of the peace and preserving the flag as a symbol of nationhood and national unity."[153] He decided that no breach of peace occurred, since: his symbolic expression did not constitute "inciting or producing imminent lawless action," Brandenburg; and it did not fall into the "small class of 'fighting words,'" Chaplinsky. Brennan clarified that the State could prevent these things, but they just did not exist in this case.[154] Citing Spence, the Court concluded that the State interest of preserving the status of the flag was related "to the suppression of free expression," removing the analysis from the O'Brien test.[155] Citing Boos as an indicator that Johnson was convicted for the content of his message, Brennan subjected the State's interest to "the most exacting scrutiny," a means-ends test.[156] He employed an extensive case history, first concluding:

> If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.[157]

His second conclusion was based on the other flag cases--Street, Barnette, Spence, Goguen--and "nothing in [these] precedents suggests that a State may foster its own view of the flag by prohibiting expressive conduct relating to it."[158] He connected

these two ideas, by saying:

> [The Court] would be permitting a State to "prescribe what shall be orthodox" by saying that one may burn the flag to convey one's attitude toward it and its referents only if one does not endanger the flag's representation of nationhood and national unity. . . . To conclude that the Government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernable or defensible boundaries.[159]

Thus, the means the State used to achieve legitimate ends were wrong. He then said that allowing this would mean the Court would have to impose its own viewpoint on the people, which was forbidden by the First Amendment, Carey. Furthermore, Brennan found that the special status of the flag was nowhere to be found in the Constitution.[160] Thus, Johnson's burning of the flag was symbolic expression protected by the First Amendment.

Ideologically speaking, the Court should have voted in favor of the state in this case, but two conservatives--Scalia and Kennedy--joined the majority. Kennedy offered some explanation for this switch in his concurring opinion:

> The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases.[161]

Kennedy was calling for judicial affirmation of a fundamental freedom, as well as putting one's emotions aside.

Rehnquist's dissent in this case had a different perspective. He illustrated the use of the flag in various wars, as

well as an extensive legislative interest in preserving the flag; this led to his conclusion that the "flag is not simply another 'idea' or 'point of view' competing for recognition in the marketplace of ideas."[162] Rehnquist stated:

> [F]lag burning is the equivalent of an inarticulate grunt [that does not] express any particular idea, [thus it] was Johnson's use of this particular symbol, and not the idea that he sought to convey by it or by his many other expressions, for which he was punished.[163]

The decision stirred up a lot of controversy; in a nation that loves its Constitution, country, and flag, an attack on those institutions will meet serious opposition. President Bush said:

> I believe that the flag of the United States should never be the object of desecration. Flag burning is wrong. Protection of the flag--a unique national symbol--will in no way limit the opportunity nor the breadth of protest available in the exercise of free speech rights.[164]

Overturning this ruling became a bi-partisan issue in Congress; the only difference was that the Republicans wanted a constitutional amendment, while the Democrats wanted a new, revised statute. The latter won out and passed through both houses by overwhelming majorities. However, some scholars, such as University of Virginia Professor O'Brien, thought the decision was within the spirit of the First Amendment, and believed its author, Madison, "would have had his heart warmed by the decision."[165]

From the flag and draft card cases, it seems the Court's position is that freedom of expression that involves a governmental or national item can only be suppressed if the government's

interest can only be furthered by the absolute protection of that item. National unity can be furthered by means other than by the flag, but the efficient running of the draft needed the selective service card.

Conclusions

Freedom of symbolic expression is a cherished value in this country. The right to belong to a group, regardless of what it stands for, has become increasingly important with the massive rise in interest groups. These interest groups, in turn, are involved in many of these expressive conduct cases, such as the demonstration for the homeless in Clark v. Community For Creative Non-Violence and the numerous civil rights cases rising involving groups like CORE. Public forum is granted unless the government has a legitimate interest in restricting it, such as preserving the right to education and requiring permits. One can freely become a symbol by what one wears. Finally, destruction of one's own property is protected expression, provided it does not interfere with the necessary means of the government, as burning a draft card did in O'Brien.

These four categories make a nice little picture of freedom of symbolic expression, but does it mean we are really free to conduct ourselves to make a statement as long as we follow these guidelines? In an essay on American democracy, Zinn said that the rich have more freedom of expression than the poor because they could use peaceful and effective means, such as the media.

However, the poor do not have that option, as he argues: "Anyone who is penniless had better have a loud voice; and then he might be arrested for disturbing the peace."[166] In these cases, that "loud voice" is the use of conduct. Martin Luther King recognized the value of this:

> Nonviolent action, the Negro saw, was the way to supplement, not replace, the process of change. It was the way to divest himself of passivity without arraying himself in vindicative force.[167]

Yet, these passive resistors get arrested, dragged through the streets, thrown into jail, and are subjected to the ordeal of a trial; then, the Supreme Court says the protestor was right. It is also true that some avoid this by suing for their rights beforehand, but then their rights are also abridged through delay; this point was made by the Supreme Court in the Skokie case. The government is trying to keep order the best it can, while preserving individual liberties. This does not guarantee justice in every case, but it leads to a gradual conception of what justice is--forming a sort of Socratic notion of resolving problems. The questions are raised by legislation and individuals, while the answers are made by the courts and through the amending process. Despite the individual attempts to chip away at freedom of symbolic expression, it has become a truly recognized concept in the American conscience. Nevertheless, we must look outside our country's borders to gain a more objective look at this freedom.

A COMPARISON WITH INTERNATIONAL TRENDS

At first glance, it appears that the United States's record on freedom of expression is extremely liberal compared with other nations. Iran just recently sentenced a man to death for a book he wrote, exposing what a rigid and tyrannical regime Khomeini was running. Not long after this, the Chinese military put down a peaceful demonstration in Tiananmen Square by opening fire on the protestors; this situation parallels Clark v. Community For Creative Non-Violence, in that it occurred in the nation's capitol, but contrasts it in that the United States allows such conduct. However, these two events were so repressive that they shocked most of the world, so it is a better idea to look at some of those "shocked" nations.

Several international agreements have much to say about freedom of expression. First, the United Nation's Universal Declaration of Human Rights, which many countries follow, has several passages that look very much like our First Amendment: Article Nineteen states that "[e]veryone has the right to freedom of opinion and expression," while Article Twenty guarantees the "right to freedom of peaceful assembly and association."[168] Second, the European Convention for the Protection of Human Rights and Fundamental Freedoms affirms these same liberties.[169] The important aspect of this is not the fact that these words exist in writing, but rather that it rests on the idea that several nations, believing so strongly in these freedoms, came together to affirm that belief.

One of these nations is West Germany, one of the most

sociologically and economically successful countries in the world.[170] This nation's constitution, the Basic Law, includes: freedom of expression "in speech, writing, and pictures"; freedom of "unarmed" assembly; and a prohibition on prior restraints.[171] Although the Nazi and Communist parties were found to be unconstitutional in 1952 and 1956, respectively, this grew out of a justification similar to Holmes' clear and present danger standard.

Another nation that believes in individual liberties is Great Britain. The especially important aspect of using Britain as a comparison is that the United States' common law grew out of England's until the revolutionary war; this amounts to an experiment designed to discover what effect several variables--such as federalism, a Constitution, the First and Fourteenth Amendments, and a Supreme Court with the power of judicial review--have on English common law. For the sake of brevity, this will be done with a comparison of symbolic expression cases with similar facts. Britain has no written constitution, and the courts lack the power of judicial review--thus, the courts merely interpret acts of Parliament.

First, groups have more rights in America than in Britain. In R. v. Jordan and Tyndall (1963), the Spearhead association were found guilty of existing as a violent organization, for "it was not necessary that there should be evidence of actual attacks or plans for attacks on opponents."[172] This contrasts the right to take part in a meeting in DeJonge, as well as imminent lawless

action being necessary to convict in Brandenburg.[173] In Jordan v. Burgoyne (1963), Jordan, the leader of the British fascists, was convicted of using insulting words against Jews, as the British court proclaimed: "A person is entitled to express his views as strongly as he likes, to criticize and to say disagreeable things about his opponents; but he must not threaten, abuse or insult by using 'hitting words.'"[174] This looks a lot like the "fighting words" doctrine in Chaplinsky.[175]

Second, the right to public forum is fairly similar in both nations. In Arrowsmith v. Jenkins (1963), a conviction for willful obstruction of a highway was upheld, although Miss Arrowhead did not intend to obstruct the highway. This contrasts the Supreme Court's rejection of the "obstruction of public passageways" conviction, in Cox v. Louisiana.[176] In Burden v. Rigler (1911), a man was convicted for disturbing another man's speech.[177] This is an unlikely result in the United States, for the First and Fourteenth Amendments only protect the people from abridgment of their rights by Congress and state legislatures, and they say nothing about individuals. Accordingly, this was the scene in Gregory, as the demonstrators endured rocks and eggs being thrown at them, but it was not an issue in the case.[178] Papworth v. Coventry (1967) involved a demonstration on Downing Street, protesting the Vietnam war. It was held that if they obstructed Members of Parliament or created a disturbance by Parliament, their actions can be punished.[179] This directly contrasts Edwards and Grace, which overturned convictions for

picketing near a State House and the Supreme Court building, respectively. In R. v. Cunninghame Graham and Burns (1888), a group was held guilty of unlawful assembly for holding a meeting in Trafalgar Square.[180] This is much like Clark, for permits were needed to demonstrate in a park in the nation's capitol.[181]

It appears that the only real difference between the United States and Great Britain is that the latter is not constrained by a constitution; the word "constrained" is used because Britain is just as free to give rights as they are to take them away, in order to achieve the best balance of liberty and order. However, tearing up our constitution is hardly the answer, since our heterogeneous society most likely could never come to the kind of consensus Britain has. As far as the world in general is concerned, the United States grants more freedom of symbolic expression than most nations, but is right in line with the western industrialized nations.

CONCLUSION

The government of law has prevailed in protecting individuals from abuses of the freedom of symbolic expression by men. Despite the Supreme Court's political nature, as shown in the Walker and Shuttlesworth sequence,[182] its academic nature resulted in reasonable boundaries for freedom of symbolic expression. The Court generally allowed this, as long as no absolutely compelling governmental interest was involved, such as maintaining security in the jails in Adderly.[183] As a result of this,

it is very common to see symbolic expression throughout the nation. For example, I have observed both pro-life and pro-abortion advocates picketing outside a clinic, every Saturday morning for a period of three months; it has been a classic confrontation of two opposing views of a major issue in this country. Furthermore, they picket on the sidewalk of one side of the street; thus, a person can still use a sidewalk to get by, and since they do not picket on the streets, the cars are not affected at all. Therefore, they have every right to be there. However, demonstrations during wartime may be restricted, if necessary, as Schenck and O'Brien have shown.[184] Nevertheless, all this is very sensible; as a reasonable person would move to the other side of the street to get past the picketers, he would also realize that a real and immediate threat to the nation's existence could only be eliminated with the full support of the people, even if it means restricting our freedom of symbolic expression.

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183. Adderly v. Florida, 385 U.S. 39 (1966).

184. Schenck v. United States, 249 U.S. 47 (1919); United States v. O'Brien, 391 U.S. 367 (1968).

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